IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO. 1928 OF 2003

IN

SUIT NO. 1705 OF 1998

Bralco Metal Industries Ltd .....Plffs.
vs.
M/s. Elite Auto Industries .....Defnds.

S.P. Dalal i/b. M/s. Dalal and Co.
for the plaintiffs.
Mr. N.K. Mudnany for defendant no.
1, 2, 4 and5 in support of N/M.

CORAM: S.U. KAMDAR, J.

DATE : 27th October, 2005.

P.C. :.

1. Learned counsel for the plaintiffs seeks leave to delete the defendant no.3 and 6 from the record of the suit because they have already expired. In that view of the matter the plaintiff is permitted to delete defendant no.3 and 6 from the record. He

states that the legal heirs are already on record and thus does not desire to bring the legal heirs on record. In so far as defendant no.17 is concerned he also seeks leave to delete defendant no.17 subject to his rights to bring legal heirs on record in pursuance to the chamber order which is pending.

2. By the present notice of Motion the learned counsel has pressed only prayer (b). It is the case of the plaintiff that the agreement was arrived at between the parties dated 28.7.99 and the said agreement is a loan agreement. Under the said agreement the plaintiff has advanced to the defendant company a loan amount of Rs.20 lacs. The said amount was due and payable in the manner set out in Clause 2 and 3 of the agreement. It is the case of the plaintiff that under clause 6 of the said agreement the defendant has agreed that until the entire amount is repaid they will not transfer and or dispose off their share, right, title and interest in the said property situated at Chakala,

Andheri.

3. Learned counsel for the plaintiff has also drawn my attention to Clause 3 of the second agreement dated 28.7.89 executed on the same day. Under clause 3 of the said agreement it is provided that the plaintiff is entitled to sell and disposed off the said property being 6150 sq. ft or thereabouts on the second floor of the building which under the earlier agreement the defendant agreed not to dispose off the same till the repayment of the loan. Learned counsel for the plaintiff has also relied upon a letter dated 1.8.99, thereunder the plaintiff is suppose to have been put in possession of the said 2nd floor of the said building. It is an admitted position as of today that the plaintiffs are not in possession of the suit property. However the learned counsel for the plaintiff contends that this premises on the 2nd floor of the building situated at Chakala, Andheri was a security created inrespect of the repayment of the loan.

4. There is no valid mortgage of the suit property either by way of equitable mortgage or an english mortgage. Mere clause in loan agreement cannot create any mortgage in favour of the plaintiff. In my opinion for the purpose of creating a valid security in an immovable property there has to be a either an equitable mortgage or english mortgage. However learned counsel for the plaintiff contends that the said agreement provided a right in favour of the plaintiff which is coupled with the right to sell in an event of default in repayment of the amount. In my opinion there is no merit in the said case in so far as the claim in the said property is based as a security for due repayment of the loan. However learned counsel has contended that even if there is no valid mortgage, he is seeking to enforce a negative convenant under Clause 6 of the said agreement. I am not inclined to accept the aforesaid contention. If there is no valid mortgage inrespect of the said immovable property then by virtue of Clause 6 of the said agreement the plaintiff cannot claim any security even by way of enforcement of negative covenant.

In that view of the matter, motion dismissed.

sd/-

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